

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 10-0189

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IN RE THE MARRIAGE OF

DAVID CARL BRINLEY,

Petitioner and Appellant,

and

IDA LOUSE BRINLEY,

Respondent and Appellee.

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On Appeal from the Montana Tenth Judicial District, Fergus County  
Honorable Wayne E. Phillips

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APPELLANT'S BRIEF

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Did the District Court err in requiring David Brinley to pay retroactive child support beginning October 1, 2007?

## STATEMENT OF THE FACTS AND THE CASE

On October 29, 2007 David and Ida Brinley's marriage was dissolved through a Decree of Dissolution that did not impose child support on either party, but stated the Child Support Enforcement Division (CSED) should make a determination at some point in the future. Decree of Dissolution, page 2. Disputes arose almost immediately with the first application for contempt filed only eleven days later.

Fifteen months after the Decree of Dissolution was entered, the Department of Public Health and Human Services (DPHHS) filed a motion to adopt CSED's child support calculations which would require David Brinley to pay \$563 per month (the DPHHS Motion). This motion was filed January 20, 2009. The District Court granted this motion on January 21, 2009.

Child support remained an issue, and on July 30, 2009, Ida Brinley filed a Motion for Contempt and Request for Show Cause Hearing, asking the Court to hold David Brinley in contempt for, among other things, failure to pay child support. A hearing was held in October of 2009 that produced some testimony, but was ultimately continued until December. An order was not issued immediately

1 following the October hearing. The contempt motion was amended on November  
2 3, 2009, and on December 21, 2009 the second contempt hearing was held which  
3 the District Court described as a “continuance of the October 21st, 2009 hearing.”  
4 December Contempt Order, page 2.

5 On February 17, 2010 the District Court issued the first of its orders  
6 stemming from these contempt hearings in its Order re December 21st, 2009  
7 Contempt Hearing (December Contempt Order). It ordered David Brinley to pay  
8 child support retroactively to “the first of the month of the month of the divorce.”  
9 December Contempt Order, page 5. The Decree of Dissolution, dissolving the  
10 parties’ marriage, was entered October 29, 2007, meaning that David Brinley was  
11 ordered to pay child support beginning October 1, 2007.

12 Six days after issuing the December Contempt Order, the District Court  
13 issued its second contempt order, this one stemming from the earlier October 21,  
14 2009 Contempt Hearing (October Contempt Order). This second Order stated that  
15 “Respondent shall pay child support of \$563.00 per month beginning October  
16 2009. The Court retains authority to later modify this amount depending on  
17 determinations made by CSED.” October Contempt Order, page 2. Presumably,  
18 the District Court intended this provision to apply to David Brinley, who was  
19 actually Petitioner in the matter and the use of “Respondent” was merely a clerical  
20 error. An order nunc pro tunc has not been issued, but the fact that the District

1 Court intended to order David Brinley to pay child support is not disputed on  
2 appeal.

3 Because the two orders are not mutually exclusive, and the Court makes no  
4 mention of one superseding the other, both apparently remain in effect. From the  
5 December Contempt Order, David now appeals.

### 6 **STATEMENT OF STANDARD OF REVIEW**

7 The District Court's conclusion as to how far it may retroactively require  
8 child support be paid is a conclusion of law, and is reviewed for correctness. Steer,  
9 Inc. v. Department of Revenue (1990), 245 Mont. 470, 803 P.2d 601.

### 10 **SUMMARY OF ARGUMENT**

11 The District Court erred in the December Contempt Order by ordering David  
12 Brinley to retroactively begin paying child support October 1, 2007. Under  
13 Montana law, the earliest David could retroactively be required to begin paying  
14 child support would be January 20, 2009. Child support modifications may only  
15 be made retroactive to the time the affected party had notice of the proposed  
16 modification.

17 The DPHHS Motion, filed January 20, 2009, was effectively a motion for  
18 modification of child support, and the first notice David Brinley received of a  
19 potential increase in his child support obligation. As such, it is the earliest date he  
20 could be required to retroactively begin paying child support. Therefore, the

1 District Court erred in the December Contempt Order, by requiring David to  
2 retroactively begin paying child support October 1, 2007.

3 The portions of the December Contempt Order relating to child support  
4 should be vacated, allowing the subsequently issued October Contempt Order to  
5 stand uncontradicted in its requirement that David begin paying retroactive child  
6 support October of 2009.

## 7 ARGUMENT

### 8 **I. The District Court erred in its December Contempt Order, by** 9 **requiring David Brinley to retroactively begin paying child** 10 **support October 1, 2007.**

11  
12 A child support obligation may only be made retroactive to the date the  
13 motion to modify child support was filed. According to MCA § 40-4-208(1) “a  
14 decree may be modified by a court as to maintenance or support only as to  
15 installments accruing subsequent to actual notice to the parties of the motion for  
16 modification.” As interpreted by In re Marriage of Windham, this Section means  
17 that “the provisions of a decree which concern child support may be modified by a  
18 court only as to installments accruing subsequent to actual notice to the parties of  
19 the motion for modification.” In re Marriage of Windham (1996), 279 Mont. 97,  
20 101, 926 P.2d 748, 751. “This statutory provision should be strictly construed.” In  
21 re Marriage of Petranek (1992), 255 Mont. 458, 460, 843 P.2d 784, 786. Because  
22 the first notice David Brinley had of a modification was January 20, 2009, the

District Court erred in the December Contempt Order by requiring him to retroactively begin paying child support October 1, 2007.

**II. The DPHHS motion was effectively a motion to modify child support, and David Brinley's first notice of such a change.**

The DPHHS Motion and Order modified David Brinley's child support obligation from \$0 per month to \$563 per month. David and Ida Brinley's decree of dissolution states that child support should be determined, but does not set an amount. It states that "Child support should be set pursuant to the Montana Child Support Guidelines. Counsel for the parties shall work together to supply an agreed upon amount to the Court. Should they be unable to do so, then the Court will set the amount." Decree of Dissolution, page 2, lines 19-21. This is simply a statement of Montana law, and only serves to advise the parties that at some point in the future, one or the other may be required to pay child support. It provides no guidance as to who will ultimately pay child support, and gives them nothing on which to base an estimate of this ultimate cost.

Until the DPHHS Motion was granted, David Brinley had effectively been ordered to pay \$0 in child support, a fact acknowledged by the District Court in the Findings of Fact of its December Contempt Order where it states:

The Court finds that *it had previously specifically ordered no child support be paid by Mr. Brinley*. Notwithstanding, the Court finds that child support should now be ordered retroactively to the first of the month of the month of divorce. The amount of the child support should be



1           determined by the Child Support Enforcement Division,  
2           and the arrearage should be paid within one year.

3  
4   Order re December 21, 2009 Contempt Hearing, page 3 (emphasis added).

5           Assuming, for convenience, that David Brinley had knowledge of the  
6   DPHHS Motion on the day it was filed, the first notice he had of the modification  
7   requiring him to begin paying child support was on January 20, 2009. As such, this  
8   is the earliest he could be required to retroactively begin paying child support  
9   under MCA § 40-4-208(1), and the District Court's December Contempt Order  
10   requiring him to pay retroactive child support to October 1, 2007 was contrary to  
11   established Montana law.

12          MCA § 40-4-208(1) is grounded in solid public policy considerations, which  
13   are clearly demonstrated in this case. From the time the Decree of Dissolution was  
14   issued, in October of 2007, until the DPHHS Motion was filed, David had no idea  
15   whether he would be required to pay child support or be owed child support.  
16   Moreover, he had no idea what amount this hypothetical child support might be.  
17   Without this knowledge, there is no way David could have adequately budgeted  
18   during those intervening fifteen months in order to save enough to satisfy some  
19   possible retroactive child support obligation later. In fact, neither the decree of  
20   dissolution, nor the District Court's order adopting the DPHHS Motion mention  
21   retroactive applicability of child support. It was not until the December Contempt

1 Order that David was suddenly ordered to pay child support for a period when  
2 none had been previously required.

3 By changing David's child support obligation from \$0 per month to \$563  
4 per month, the DPHHS Motion was effectively a Motion to Modify Child Support,  
5 and should be treated as the first notice David was given of such a change.  
6 Therefore, the December Contempt Order requiring him to pay child support  
7 retroactively to a date before the DPHHS Motion must be vacated.

8 **III. The December contempt order, as it relates to retroactive child**  
9 **support should be vacated allowing the October Contempt Order**  
10 **to stand uncontradicted.**  
11

12 Confusingly, the December 2009 Contempt Order was issued prior to the  
13 October 2009 Contempt Order. However, while the December Contempt Order is a  
14 violation of Montana law, the October Contempt Order is consistent with Montana  
15 statutes and case law. The December Contempt Order requires David to pay  
16 retroactive child support beginning October 1, 2007. December Contempt Order,  
17 page 5. This date is approximately 17 months prior to the notice of child support  
18 modification David received as the DPHHS Motion, and therefore a violation of  
19 MCA § 40-4-208(1).

20 Meanwhile, the October Contempt Order states that, "Respondent shall pay  
21 child support of \$563.00 per month beginning October 2009. The Court retains  
22 authority to later modify this amount depending on determinations made by

1 CSED.” October Contempt Order, page 2. This date falls within the permissible  
2 range of retroactive child support.

3 David Brinley first received notice of the proposed modification in his child  
4 support obligation on January 20, 2009 through the DPHHS Motion. Under § 40-4-  
5 208(1), MCA, any retroactive application of this modification can only be imposed  
6 back to that date. The December Contempt Order, by requiring David to pay  
7 retroactive child support beginning before January 20, 2009 is a violation of § 40-  
8 4-208(1), MCA. The December Contempt Order, as it relates to retroactive child  
9 support, should therefore be vacated, allowing the October Order to stand.

## 10 CONCLUSION

11 The Court erred in the December Contempt Order by ordering David’s child  
12 support to be retroactive to October 1, 2007, a date earlier than when David had  
13 notice of the proposed modification. Under Montana law, the child support  
14 modification can only be retroactive to January 20, 2009, the day David first had  
15 knowledge of the DPHHS Motion. The October Contempt Order, which was  
16 actually issued after the December Contempt Order, requires David to retroactively  
17 pay child support beginning October, 2009, a date after David had notice of the  
18 modification, and thus a permissible order.

19 The December Contempt Order should be vacated as to retroactive child  
20 support leaving the October Contempt Order in place and unmodified.

DATED this \_\_\_\_ day of July, 2010.

MEASURE & WILSON, P.C.

By: \_\_\_\_\_  
Paul D. Sullivan  
Attorney for Appellant, David Brinley

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

DATED this \_\_\_\_ day of July, 2010.

MEASURE & WILSON, P.C.

By: \_\_\_\_\_  
Paul D. Sullivan  
Attorney for Appellant, David Brinley

## **CERTIFICATE OF MAILING**

I, the undersigned, do hereby certify that on the \_\_\_\_ day of July, 2010, a true and correct copy of the foregoing document was duly served by placing the same in the U.S. Mail, postage prepaid and addressed to the following:

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